

## Memorandum 97-2

### Judicial Review of Agency Action: Local Agency Issues

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The staff has sent the text of the judicial review and conforming revisions bills to Legislative Counsel for preparation in bill form. This Memorandum discusses issues left over from the last meeting. We expect written comments from the working group of the County Counsels' Association and League of California Cities. We will supplement this Memorandum when we have those comments.

#### **§ 1121. Proceedings to which title does not apply**

At the last meeting, the Commission considered a staff recommendation to exempt ordinances and resolutions of a county board of supervisors or a city council from the draft statute. The Commission noted that a resolution may be used for action that is not legislative, and did not want a resolution used for non-legislative action to be exempt. The Commission wanted to limit the exemption to legislative action where the power to act derives from original jurisdiction granted by the California Constitution — ordinances and regulations (but not resolutions). See Cal. Const. art. XI, § 7; *cf.* *Gilbert v. Stockton Port Dist.*, 7 Cal. 2d 384, 387-89, 60 P.2d 847 (1936) (legislature may not confer home rule power on local agencies other than cities and counties, such as sanitary or port districts). The Commission also did not want to exempt regulations of subordinate local bodies, such as regulations of a local civil service commission.

The authority for a city or county to act by resolution appears to be granted entirely by statute, and not by the California Constitution. See, e.g., Gov't Code §§ 6549 (resolution approving bonds under joint powers agreement), 23600 (county resolution designating alternative temporary county seat), 25209 (county resolution correcting error in deed to county), 25526 (county resolution for sale or lease of property), 27281 (county resolution accepting conveyance), 29321 (county resolution establishing revolving fund), 29910 (county resolution issuing bonds), 31641.95 (county resolution concerning retirement), 34091.1 (city resolution naming street), 43654 (city resolution providing for issuance of bonds), 50195 (resolution relocating city boundary), 50231 (city or county resolution declaring abandoned excavation as public nuisance), 50438 (city resolution concerning

vacating easement), 50552-50557 (resolution concerning intent to sell improvements), 51330 (resolution of chartered city transferring function to county), 53824 (city or county resolution issuing evidence of indebtedness), 54380 (resolution for bond election). To carry out the Commission's wish, city and county ordinances and regulations should be exempted from the draft statute, but not resolutions. This may be done by revising Section 1121 as follows:

1121. This title does not apply to any of the following:

....

(d) Judicial review of an ordinance of a local agency or regulation enacted by a county board of supervisors or city council pursuant to authority granted by the California Constitution.

**Comment.** . . . Subdivision (d) makes clear this title does not apply to judicial review of an ordinance or regulation of a county board of supervisors or city council enacted pursuant to authority granted by the California Constitution. See Cal. Const. art. XI, § 7. These matters remain subject to judicial review by traditional mandamus or by an action for injunctive or declaratory relief. See, e.g., *Karlson v. City of Camarillo*, 100 Cal. App. 3d 789, 798, 161 Cal. Rptr. 260 (1980) (mandamus to review amendment of city's general plan); *cf. Guidotti v. County of Yolo*, 214 Cal. App. 3d 1552, 1561-63, 271 Cal. Rptr. 858, 863-64 (1986) (declaratory and injunctive relief and mandamus to review setting by county of levels of general relief). Subdivision (d) does not exempt city or county resolutions from application of this title.

The exemption in the conforming revision to Government Code Section 65009 must be similarly revised.

#### **§ 1123.520. Superior court venue**

Section 1123.520 has separate venue rules for state and local agencies. However, there may be agencies that are neither state nor local. Examples include the San Francisco Bay Conservation and Development Commission and the Tahoe Regional Planning Agency, which consist of representatives from both state and local government. Gov't Code §§ 66620, 66801. (The Golden Gate Bridge, Highway and Transportation District is governed by directors appointed by counties of the region, and so appears to be an "other local public agency" within the meaning of Government Code Section 54951. See Sts. & Hy. Code § 27510.)

Under Section 1123.520, venue for review of state agency action is in the county where the cause of action arose, or Sacramento County. For local agency action, venue is in the county or counties of jurisdiction of the local agency.

Under both existing administrative and traditional mandamus, venue is determined under the rules for civil actions generally, viz., the county where the cause of action arose. California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); California Civil Writ Practice § 5.4, at 185, § 9.29, at 308 (Cal. Cont. Ed. Bar, 3d ed. 1996). Thus, for state agencies, the draft statute continues existing law, except for the addition of Sacramento County. For local agencies, as the Comment notes, Section 1123.520 “is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency’s jurisdiction.”

Section 1123.520 is silent on venue for nongovernmental entities, so venue rules for civil actions generally will apply under Section 1123.710(a), the same as under existing law. Thus under the draft statute and existing law, judicial review of action of a nongovernmental entity is where the entity is located. See Code Civ. Proc. § 395; California Administrative Mandamus, *supra*, § 8.16, at 270.

It seems better to apply the local agency rule (county of agency’s jurisdiction) for hybrid agencies. Otherwise, the judicial review proceeding might be brought in Sacramento County, even though the agency’s jurisdiction does not extend to Sacramento County. See, e.g., Gov’t Code §§ 66603, 66651 (BCDC responsible for San Francisco Bay Plan), Gov’t Code § 66801 (Tahoe Regional Planning Agency responsible for regional plan for Tahoe Basin). **Thus Section 1123.520 should be revised as follows:**

1123.520. (a) Except as otherwise provided by statute, the proper county for judicial review under this chapter is:

(1) In the case of state agency action, the county where the cause of action, or some part thereof, arose, or Sacramento County.

(2) In the case of action of a nongovernmental entity, the county where the entity is located.

(3) In cases not governed by paragraph (1) or (2), including local agency action, the county or counties of jurisdiction of the agency.

(b) [change of venue]

**Comment.** Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review of state agency action, with the addition of Sacramento County. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532,

271 P.2d 194 (1954). Subdivision (a)(2) continues what appears to have been existing law for judicial review of action of a nongovernmental entity. See California Administrative Mandamus, *supra*, § 8.16, at 270.

Subdivision (a)(3) is new, but is probably not a substantive change for local agencies, since the cause of action is likely to arise in the county of the local agency's jurisdiction. In addition to applying to local agencies (defined in Section 1121.260), subdivision (a)(3) applies to hybrid agencies made up of representatives both of state and local government. See, e.g., Gov't Code §§ 66620 (San Francisco Bay Conservation and Development Commission), 66801 (Tahoe Regional Planning Agency).

. . . . [change of venue]

The venue rules of Section 1123.520 are subject to a conflicting or inconsistent statute applicable to a particular entity (Section 1121.110), such as Business and Professions Code Section 2019 (venue for proceedings against the Medical Board of California). For venue of judicial review of a decision of a private hospital board, see Health & Safety Code § 1339.63(b).

The addition of a provision for nongovernmental entities is necessitated by the broadening of paragraph (3), above. A similar revision for hybrid agencies is also needed in Section 1123.630, discussed below. Three other sections that refer to a "state" agency appear satisfactory as drafted. See Sections 1120, 1123.430(b), 1123.730(c).

#### **§ 1123.630. Notice to parties of last day to file petition for review**

At the last meeting, the Commission asked the staff to replace the single form of notice of the last day for judicial review with a more finely-tuned notice to reflect the limitations period applicable in the particular type of proceeding. **To do this, the staff deleted Section 1123.630 from the draft statute, put separate notice provisions in each of the two limitations sections, and renumbered them, as follows:**

~~1123.630. In addition to any notice of agency action required by statute, in an adjudicative proceeding, the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless the time is extended as provided by law."~~

~~1123.640~~ 1123.630. (a) The petition for review of a decision of a state an agency, other than a local agency, in an adjudicative

proceeding, and of a decision of any a local agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by ~~Section 1123.630~~ subdivision (e) is delivered, served, or mailed, whichever is later.

(b) For the purpose of this section:

(1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.

(2) ~~A decision of a state agency in~~ In an adjudicative proceeding other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, a decision of an agency other than a local agency is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions is satisfied:

(A) Reconsideration is ordered within that time pursuant to express statute or rule.

(B) The agency orders that the decision is effective sooner.

(C) A different effective date is provided by statute or regulation.

....

(e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless another statute provides a longer period or the time is extended as provided by law."

~~1123.650~~ 1123.640. (a) The petition for review of a decision in an adjudicative proceeding, other than a petition governed by Section ~~1123.640~~ 1123.630, shall be filed not later than 90 days after the decision is announced or after the notice required by ~~Section 1123.630~~ subdivision (d) is delivered, served, or mailed, whichever is later.

....

(d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental laws, as early as 30 days after the required notice is filed."

**Is this satisfactory?**

Applying the 30-day limitation period of Section 1123.630(a) to hybrid agencies is consistent with existing administrative mandamus, where the 90-day limitations period applies only to local agencies (other than school districts) as defined in Government Code Section 54951. Code Civ. Proc. § 1094.6. For agencies other than local agencies, the existing limitations period is prescribed in Government Code Section 11523 for review of formal adjudication under the Administrative Procedure Act, or by special statutes applicable to the particular proceeding. California Administrative Mandamus, *supra*, § 7.3, at 240. We also preserve the existing 30-day limitations period in Government Code Sections 66639 and 66641.7 for judicial review of action of BCDC.

The Commission asked if there are special limitation periods shorter than 30 days that should be taken into account in the notice. All limitation periods for judicial review are 30 days or longer. The State Department of Health Services wanted to preserve its requirement that a licensee who wants to contest a citation must notify the agency within 15 days. Health & Safety Code § 1428. The draft statute does not affect internal agency procedures such as this one.

**§ 1123.830. Preparation of record**

At the last meeting, the Commission approved a requirement of advance payment of the fee for the record. The Commission asked the staff to consider whether there should be a provision for the court to order the agency to produce the record, or to require the agency to refund the fee, when the agency fails to do so in a timely manner. Existing statutes do not prescribe any remedy for the agency's failure to deliver the record within the required time, but "the petitioner may be able to persuade the court to grant an appropriate remedy, such as an order requiring the record to be delivered by a particular date." California Administrative Mandamus, *supra*, § 8.10, at 265. **The staff recommends including this in Section 1123.830 as follows:**

(b) Except as otherwise provided by statute, the administrative record shall be delivered to the petitioner as follows:

(1) Within 30 days after the request and payment of the fee provided in Section 1123.910 in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.

(2) Within 60 days after the request and payment of the fee provided in Section 1123.910 in a nonadjudicative proceeding, or in

an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

(c) The time limits provided in subdivision (b) may be extended by the court for good cause shown. If the agency fails timely to deliver the record, the court may order the agency to deliver the record, and may impose sanctions and grant other appropriate relief.

### **§ 1123.850. New evidence on judicial review**

Local agency representatives are concerned the draft statute goes too far in imposing a closed record requirement. They are concerned they will have to build a more elaborate administrative record in preparation for a possible court challenge, increasing the cost of local agency proceedings. The Commission considered this point in December, and decided not to create additional exceptions to the closed record requirement.

The Commission may wish to consider authorizing the Judicial Council to provide by rule for open record review in cases not mentioned in the statute. This could be done by revising Section 1123.850 as follows:

1123.850. (a) If the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in this section, the court shall not admit the evidence on judicial review without remanding the case.

(b) The court may receive evidence described in subdivision (a) without remanding the case in any of the following circumstances:

(1) The evidence relates to the validity of the agency action and is needed to decide (i) improper constitution as a decision making body, or grounds for disqualification, of those taking the agency action, or (ii) unlawfulness of procedure or of decision making process.

(2) The agency action is a decision in an adjudicative proceeding and the evidence relates to an issue for which the standard of review is the independent judgment of the court.

(c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case in either any of the following circumstances:

(1) No hearing was held by the agency, and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be

served by receiving the evidence itself. This paragraph does not apply to judicial review of rulemaking.

(2) Judicial review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional.

(3) As provided by rules of court adopted by the Judicial Council.

(d) If jurisdiction for judicial review is in the Supreme Court or court of appeal and the court is to receive evidence pursuant to this section, the court shall appoint a referee, master, or trial court judge for this purpose, having due regard for the convenience of the parties.

(e) Nothing in this section precludes the court from taking judicial notice of a decision designated by the agency as a precedent decision pursuant to Section 11425.60 of the Government Code.

Respectfully submitted,

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